BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The erroneous construction placed by the court below upon the notice of appeal herein should be corrected not only because it is erroneous but because it is directly contrary to the spirit and the requirements of the Federal Rules of Civil Procedure and in conflict with the construction thereof by other Circuit Courts of Appeals.

The order appealed from, entered February 7, 1944, decided two motions, one by respondent and one by petitioner. The petitioner intended to bring before the court below only the ruling on its motion. Therefore, as required by Federal Rule of Civil Procedure 73 (b) it was necessary for petitioner to "designate the judgment or part thereof appealed from". The notice of appeal designates the portion of the order "denying the motion of this defendant for a determination and taxation of its costs and expenses against plaintiff" (R. 43). This constituted an appeal from the entire portion of the order denying petitioner's motion.

The trial court, in ruling upon petitioner's motion for costs and expenses, entered an order that defendant's motion "for determination and taxation of defendant's litigation costs and expenses against plaintiff is hereby denied without prejudice" (R. 42). That is the first paragraph of the part of the order of which petitioner complains. The second and ensuing paragraph thereof provides:

> "In the event that the action entitled '*National Nut Company of California, plaintiff, v. The Kelling Nut Company, et al., defendants*', pending in the District

> Court of the United States for the Northern District of Illinois, Eastern Division, No. 43 C 423, is tried and submitted without unreasonable delay, the defendant may thereafter renew its said motion, and in the event of unreasonable delay in the trial and submission of such action, then upon due notice to plaintiff, defendant may apply to this court for leave to renew its said motion" (R. 42).

It is obvious that the language of the order saying that the motion was denied "without prejudice" is meaningless. If these two words meant what they said petitioner could have renewed its motion the next day, and it would have had no complaint to take to the reviewing court. The court below, instead of reading the notice of appeal as designating the portion of the order dealing with petitioner's motion, used the *words* as specifically descriptive of a part only of the order and therefore of the only part appealed from. At best this can be considered destructively literal and technical. In fact, it is simply misunderstanding.

Petitioner's second specification charges error "in refusing to proceed to the determination and taxation against plaintiff of such costs and expenses" (R. 46, 72). This clearly indicates petitioner's insistence on its right to have its costs and expenses determined and paid presently and not at some remote time not within petitioner's control. It was and is petitioner's position that the postponement of the allowance of costs to some indefinite time in the future was a final order[6] and that it was an abuse of discretion for the trial court to refuse to hear and determine them.

6. *American Brake Shoe & Foundry Co.* v. *New York Rys. Co.*, (2 Cir.), 282 F. 523, 527; *City and County of Denver* v. *Stenger*, (1 Cir.), 295 F. 809, 813. And see *Bedgisoff* v. *Cushman*, (9 Cir. 12 F. 2d, 667.

It is clear that the requirement for the designation of the order, or part thereof, appealed from is to enable the adversary party to know the scope of the appeal and if the record will include what is necessary for review. So, also, of the specifications of error. There is no claim by either the respondent or by the court below that the record was in any respect inadequate *for review of the questions petitioner seeks to raise*. Respondent has asserted no claim as to the insufficiency of the notice of appeal.

It is true that respondent urged that the order was not final and appealable and that respondent sought to justify the trial court's decision as a sound exercise of discretion. The opinion of the court below does not indicate agreement with respondent upon these propositions.[7] Under these circumstances it was clearly erroneous for the court below, *sua sponte*, to adopt what is, even on the most favorable view, a narrow and technical construction of the notice of appeal. In so doing it has run counter to decisions of other circuits as well as to the requirements of statute and rule.

In *Keeley* v. *Mutual Life Insurance Co. of N. Y.*, 7 Cir. 113 F. 2d. 633, dismissal of an appeal was suggested by reason of appellant's failure to file a statement of points under rule 75(d). The court announced its conclusion as follows (p. 636):

> "Appellee, however, has not suggested that her cause on appeal was in any way prejudiced by the failure of appellant to either serve, or file with the clerk, a concise statement of the points to be relied upon on appeal. *In the absence of any claim of injury*, we do not feel justified in dismissing the appeal." (Emphasis supplied).

7. As we read the opinion, the conclusion of the court below that the order appealed from was not a final order was reached only after the improper narrowing of the notice of appeal.

In *Shannon* v. *Retail Clerks, etc.*, 7 Cir., 128 F. 2d, 553, the court said (p. 555):

> "On this record we would hardly be justified in dismissing the appeal because an erroneous date of the order is given in the notice of the appeal."

In *Levy* v. *Levy* (D. C. Court of Appeals), 135 F. 2d, 663, appeal was dismissed because the notice of appeal did not designate the order from which the appeal was taken in a case where there were many orders. Consequently, the court was unable to proceed, although it said that "In some cases this would be a formal and not necessarily fatal defect" (citing the *Shannon case* and *Rosenberg* v. *Union Trust Co. of Rochester*, 259 N. Y. 123, 181 N. E. 71).

In *Roth* v. *Hyer*, (5 Cir.), 142 F. 2d, 227, the appellee contended that the appeal did not bring up any orders or judgments except those named in the notice of appeal. The court said:

> "We think otherwise. The final judgment (or such interlocutory one as may be appealed from), is the judgment to be designated under Rule of Civil Procedure 73b; *but the appeal draws in question all rulings of the court that produced that judgment.*" (Emphasis supplied.)

These decisions are obviously in agreement with the underlying policy as outlined by rule and statute. Federal Rule of Civil Procedure 61 states that "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." As was noted in *University City, Missouri* v. *Home Fire & Marine Ins. Co.* (8 Cir.), 114 F. 2d, 288, 295:

> "This rule is intended for the guidance of the district court, but it should be heeded by the appellate court to make it effective."

Section 391, Title 28, U. S. C. A., Judicial Code, Sec. 269, provides that: "On the hearing of any appeal • • • in any

case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

And Federal Rule of Civil Procedure 1 states the policy of the rules thus: "They shall be construed to secure the just, speedy and inexpensive determination of every action."

It thus appears that the court below, by a misapprehending literalism that has the appearance of strictest technicality, has refused correction of serious errors which have resulted from failure to apply properly important considerations of public policy—not only as to the construction of Federal Rule of Civil Procedure 73b but also Rule 41 (a)(2).

II.

Rule 41(a)(2) has been overwhelmingly considered as giving effect to previously existing policy and to require a plaintiff, permitted to dismiss without prejudice, to reimburse his adversary for costs and expenses, at the least, before plaintiff is permitted to institute another suit. This is an important question of Federal Procedural law that has not been and should be decided by this Court.

The real issue in this case is not complex. Respondent instituted this action in Los Angeles, although its own place of business was in Oakland, and petitioner was an Illinois corporation (R. 2), and it already had had a suit pending in Chicago against another Chicago company for over four years. After some twenty months of activity in this case, respondent concluded it would rather carry on its litigation in one suit in Chicago. Under the

Rules it had the right to ask the court's permission to dismiss the California action, but such right is controlled by Federal Rules of Civil Procedure 41 (a)(2), which provides that:

> "an action shall not be dismissed at the plaintiff's instance save upon order of the court, and upon such terms and conditions as the court deems proper."

It has been well said that "the dismissal without prejudice means the defendant has been put to expense literally for nothing" (*McCann* v. *Bentley States Corporation*, 34 F. Supp. 234). And the same judge, referring to the terms and conditions of Rule 41(a)(2) said: "No 'terms and conditions' are conceivable *except such as are calculated to compensate the defendant for the expense to which he has been put.*" (Emphasis supplied).

This view has met with wide approval (*Welter* v. *E. I. duPont deNemours & Co.*, 1 F. R. D. 551; *Taylor* v. *Swift & Co.*, 2 F. R. D. 424; *Mott* v. *Connecticut General Life Insurance Co.*, 2 F. R. D. 523; *DeFilippis* v. *Chrysler Sales Corporation*, 116 F. 2d. 375; *Hamilton Watch Co.* v. *Hamilton Chain Co.*, 43 F. Supp. 85). In one case the imposition of costs was contingent only on the institution of a new suit. An order dismissing without prejudice and without imposing costs was reversed as an abuse of discretion in *Home Owners' Loan Corporation* v. *Huffman* (8th Cir.), 134 F. 2d 314, 316, citing many decisions of this Court prior to Rule 41(a)(2), such as *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 370; *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 19, 20, *and Ex Parte Skinner & Eddy Corp.* 265 U. S. 86, 93.

The eighth Circuit Court of Appeals properly said, in that case, that Rule 41(a)(2) is "declaratory of long established practice in the courts," 134 F. 2d 314, 316. A square authority supporting petitioner's request for costs

and expenses in *Concrete Mixing and Conveying Co.* v. *Great Western Power Co.* (D. C. Cal.), 46 F. 2d 331, where the court said, in allowing $12,000 of costs and expenses (p. 332):

> "In the matter of the expenses, it was the judgment of the court when the order was made, and likewise is now, that it would be inequitable to leave it open to plaintiff to renew the litigation in its own time and to impose the necessity for repreparation upon defendant, without having reimbursed the latter for the expenses of preparation in the instant suit, by plaintiff's voluntary and belated dismissal rendered largely, if not wholly, useless. Otherwise, a wealthy litigant could ruin another by repetitions by plaintiff's tactics here."

Thus, the issue really presented on this record is whether or not a trial court, permitting a patentee to dismiss without prejudice for the sole purpose of carrying on further litigation against the same defendant (and others) in another circuit, may refuse the defendant the right to a determination of its costs and expenses until the conclusion of the subsequent litigation involving some, but not all, of the same issues. To state the question is to answer it, for the rationale of all of the decisions allowing costs and expenses is that a party to litigation may not be subjected to such harassment. Any other construction of Rule 41(a)(2) simply reads the rule out of existence.

This, it is submitted, is an important question of Federal procedural law which has not been but should be passed upon by this court.

Respectfully submitted,

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